

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.,	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	4:05-CV-00329 TCK-SAJ
	)	
TYSON FOODS, INC., et al.,	)	
	)	

**THE CARGILL DEFENDANTS’  
RULE 37(b) MOTION FOR SANCTIONS  
AND BRIEF IN SUPPORT**

Pursuant to Federal Rule of Civil Procedure 37(b), Defendants Cargill, Inc. (“Cargill”) and Cargill Turkey Production, LLC (“CTP”) (together, the “Cargill Defendants”) respectfully move for an order sanctioning Plaintiffs for failure to comply with this Court’s Order of May 17, 2007 compelling discovery responses. (Docket No. 1150) Plaintiffs’ continued refusal to obey this Court’s Order has unfairly prejudiced the Cargill Defendants.

**I. BACKGROUND**

After being frustrated by Plaintiffs’ discovery failures for nearly six months, the Cargill Defendants successfully moved to compel discovery in February 2007. Following a full hearing and (at Plaintiffs’ request) a supplemental round of briefing, this Court issued a clear and concise Order on May 17 compelling Plaintiffs to supplement its answers to certain interrogatories in various specific ways.

**A. The Court's Order Regarding Cargill Interrogatories 9 and 13.**

The May 17 Order concluded that Plaintiffs' responses to Cargill Interrogatories Nos. 9 and 13 were inadequate. (Docket No. 1150 at 8-9.) Those interrogatories asked:

**Interrogatory No. 9:** Separately for each Cargill entity at issue, state with particularity the factual and legal basis for the allegation contained in ¶ 56 of Your Amended Complaint that any Cargill entity's "poultry waste disposal practices are not, and have not been, undertaken in conformity with federal and state laws and regulations" and identify every witness upon whom You will rely to establish each fact.

**Interrogatory No. 13:** Separately for each Cargill entity at issue, state with particularity the factual and legal basis for the allegation contained in Count 4 of Your Amended Complaint that the conduct and acts of any Cargill entity constitute a nuisance under Oklahoma law and identify every witness upon whom You will rely to establish each fact.

(Docket No. 1054 Ex. 3 at 6, 7.)

With respect to Interrogatory No. 9, the Court ordered Plaintiffs "to file a supplemental response describing with particularity each instance of which Plaintiff has knowledge where a Cargill entity has used poultry waste disposal practices in violation of federal and state laws and regulations." (Docket No. 1150 at 8.) The Court further instructed that "[i]f Plaintiff has no direct evidence of such violation and is relying on circumstantial evidence, the response shall so state and shall describe the circumstantial evidence with as much particularity as possible." (*Id.* at 8-9.)

For Interrogatory No. 13, the Court likewise ordered Plaintiffs "to file a supplemental response describing with particularity each instance of which Plaintiff has knowledge in which a Cargill entity has created or maintained a nuisance in the State of Oklahoma." (*Id.* at 9.) Again, the Court specified that if indeed "Plaintiff has no direct evidence of such violation and is relying on circumstantial evidence, the response shall so state and shall

describe the circumstantial evidence with as much particularity as possible.” (*Id.*) The Court concluded by directing that, “[i]f Plaintiff has no direct or circumstantial evidence other than that provided in the response to Cargill interrogatory number 2, the supplemental response shall so state.” (*Id.*)

**B. The Court’s Order Regarding Plaintiffs’ Rule 33(d) Responses.**

The Order of May 17 also memorialized Plaintiffs’ agreement on the record to abide by the Court’s February 28 and April 4 Orders regarding interrogatories answered with references to documents pursuant to Federal Rule of Civil Procedure 33(d). (Docket No. 1150 at 2.) The standards set forth in those rulings (referred to in shorthand as the “Tyson rule”) require Plaintiffs to supplement any Rule 33(d) responses by providing the range of Bates numbers and the numbers of boxes of documents that are responsive. (Order of Feb. 26, 2007 (Docket No. 1063) at 7-8.) Where Bates numbers are not available, Plaintiffs must clip together or otherwise clearly identify the particular documents invoked to answer a given interrogatory. (Order of Apr. 4, 2007 (Docket No. 1118) at 1-2.)

**C. Plaintiffs’ Supplementation.**

After moving for reconsideration of the May 17 Order, Plaintiffs served supplemental interrogatory responses on June 1, 2007 – ten months after the requests were originally served. (Docket Nos. 1189-11, 1189-12.) As discussed below, even as supplemented, Plaintiffs’ responses to Cargill Interrogatories Interrogatory Nos. 3, 9, 13 and 16 and CTP Interrogatory Nos. 6, 13, and 15 remain deficient. To avoid bringing this issue before the Court again, the Cargill Defendants notified Plaintiffs of the remaining deficiencies in their supplementation several times, including by detailed letter on June 18. (*See* Docket No. 1189-13 at 3-4; *see also* Docket No. 1189 at 14.) The Cargill Defendants explained to

Plaintiffs that, although the Cargill Defendants appreciated that some information was still being gathered for and analyzed by Plaintiffs' experts, the May 17 Order requires Plaintiffs to plainly answer Interrogatories 9 and 13. (Docket No. 1189-13 at 3-4.) The parties unsuccessfully met and conferred on this issue on July 25, 2007. (See also Docket No. 1189 at 13-14.)

## II. ARGUMENT

The Court should sanction Plaintiffs for their failure to comply with the Court's May 17, 2007 Order to supplement these interrogatory answers.

As to Cargill Interrogatory Nos. 9 and 13, the Cargill Defendants ask the Court to order that, should Plaintiffs fail to directly and completely respond to the requests as required by the May 17 Order within 10 days, Plaintiffs are precluded from offering any evidence, direct or circumstantial, in support of their allegations:

- that any Cargill entity's poultry waste disposal practices are not, or have not been, undertaken in conformity with federal and state laws and regulations (Complaint ¶ 56, Cargill Interrogatory No. 9) or
- that the acts of any Cargill entity constitute a nuisance under Oklahoma law (Count 4, Cargill Interrogatory No. 13).

As to the Rule 33(d) interrogatory responses, the Cargill Defendants ask the Court to order that, should Plaintiffs fail to produce or identify specific documents in response to Cargill interrogatories 3 and 16 and CTP interrogatories 6, 13, and 15 in accordance with the Court's Orders of February 27 and April 4, Plaintiffs are precluded from offering any

evidence, direct or circumstantial, in support of the allegations contained in paragraphs 31, 51, 142, and Count VI of their complaint, to which those interrogatories pertain.<sup>1</sup>

**A. Plaintiffs Violated the Court's May 17, 2007 Order.**

Both Plaintiffs' supplemental responses to Cargill Interrogatories Nos. 9 and 13 and their supplementation to their Rule 33(d) responses fail to comply with this Court's clear Order of May 17, 2007.

**i. Plaintiffs' Supplemented Responses to Interrogatories 9 and 13 Violate the Court's Order.**

Plaintiffs' responses to Interrogatories 9 and 13 still fail to specify *any* specific information about what acts or omissions Plaintiffs claim the Cargill Defendants committed, while simultaneously refusing to admit that Plaintiffs have no such direct or specific information. Citing no direct evidence at all, Plaintiffs circularly claim that "[t]o the extent that the State will prove that the Cargill Defendants have violated these statutes and regulations [or created a nuisance] through other direct evidence, it will supplement its response to disclose that other direct evidence." (Docket No. 1189-11 at 11-13, 17-20.)

Indeed, even the supposed "circumstantial" evidence Plaintiffs offer in response to Interrogatory Nos. 9 and 13 merely recounts what Plaintiffs hope their experts might be able to prove at trial, and does not provide either supporting references and evidence or any hint of any specific connection to the Cargill Defendants. (See id.) Such aspirations and theories

---

<sup>1</sup> Because CTP Interrogatory No. 6 does not inquire into a particular allegation by Plaintiffs, the Cargill Defendants request that the Court sanction Plaintiffs as to that interrogatory in any manner promoting justice.

cannot suffice as even circumstantial *evidence* of alleged statutory violations committed or nuisances created and maintained by the Cargill Defendants.<sup>2</sup>

This Court has already found that the Cargill Defendants are entitled to the factual and legal basis for Plaintiffs' allegations regarding Cargill and CTP – the evidence that Federal Rule of Civil Procedure 11 required Plaintiffs to have at the time they filed their Complaint, as well as any facts identified subsequent to that filing. Nevertheless, despite this Court's straightforward Order requiring them to do so, Plaintiffs refuse *either* to identify any direct evidence or information regarding the Cargill Defendants *or* to admit that have they no such specific information.<sup>3</sup>

**ii. Plaintiffs' "Supplementation" of Rule 33(d) Responses Violates the Court's Order.**

Plaintiffs' "supplementation" of their Rule 33(d) responses to Cargill Interrogatories Nos. 3 and 16 and CTP Interrogatories Nos. 6, 13, and 15 likewise violates the Court's May

---

<sup>2</sup> Confusingly, Plaintiffs supplemented their response to Interrogatory No. 2 but ignored the Court's Order to plainly state whether they have any "evidence" other than that provided in the response to Cargill Interrogatory No. 2. (See Order of May 17 at 9). Plaintiffs' supplemental response to Interrogatory No. 2 lists generic studies and articles about the poultry industry as a whole; broad scientific theories and articles not pertaining particularly to the IRW, the poultry industry, or the Cargill Defendants; and a small handful of articles discussing the IRW generally. (See Docket No. 1189-11 at 2-5.)

<sup>3</sup> Plaintiffs responded similarly to Defendant Cal-Maine's motion to compel discovery of July, 25, 2007, which sought among other things specific factual answers to interrogatories regarding Plaintiffs' allegations that Cal-Maine and its contract growers violated statutes and regulations. (Docket No. 1221 at 2, 5-7.) Plaintiffs' opposition brief claims that they need neither to answer particularly nor admit that they have no particular information. Instead, Plaintiffs claim that they have explained their "circumstantial evidence with as much particularity as possible," and that "in those circumstances in which it determine[s] to rely on direct evidence of the release of waste at specific times and places, it would supplement its response with the specific direct evidence it would use." (Docket No. 1234 at 4-5.)

17 Order. As discussed above, the Court, with Plaintiff's agreement, applied the "Tyson Rule" and ordered Plaintiffs to supplement these Rule 33(d) responses by providing the range of Bates numbers and the numbers of boxes of documents Plaintiffs deemed responsive. Instead of providing this additional specification, however, Plaintiffs actually *withdrew* their prior Rule 33(d) designation and instead stated their mere future *intent* to supplement their response "as responsive information is identified." (Docket Nos. 1189-11 at 6, 23; 1189-12 at 8, 11-12.) In other words, Plaintiffs "supplemented" their response, not by providing more information, but by providing *less*.

According to Plaintiffs' original February 2007 responses, executed under oath, Plaintiffs have documents that contain information responsive to these requests. (Docket Nos. 1054 Ex. 3 at 8-9, 26-27; 1054 Ex. 4 at 9-10, 17-18, 20-22.) Nonetheless, Plaintiffs now impliedly assert that despite the Court's Orders, they need not produce such information until they opt to provide the Cargill Defendants with specific documents. This response contradicts both the letter and the spirit of three different discovery Orders by this Court. Despite repeated requests by the Cargill Defendants, Plaintiffs have refused to comply with the Court's Orders or provide any information responsive to these interrogatories.

**B. The Court Should Sanction Plaintiffs' Violation of the Court's Discovery Order.**

The Court should sanction Plaintiffs for these violations of the Court's Order. Rule 37 allows district courts to impose an array of sanctions for failure to comply with discovery orders. "If a party ... fails to obey an order to provide or permit discovery ... the court in which the action is pending may make such orders in regard to the failure as are just." Fed. R. Civ. P. 37(b)(2). The Northern District of Oklahoma has held that "any conduct of the

kind that ordinarily would be sanctionable under Rule 37 but which falls outside the express terms of the rule can be remedied by exercise of the Court's inherent powers..." Lewis v. Wal-Mart Stores, Inc., Civ. No. 02-0944 (CVE/FHM), 2006 U.S. Dist. LEXIS 47014, at \*9-10 (N.D. Okla. July 11, 2006) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980); Jones v. Thompson, 996 F.2d 261, 264 (10th Cir. 1993)). This Court thus enjoys broad discretion in fashioning discovery sanctions. Indeed, under Rule 37(b)(2), this Court could enter much steeper sanctions for Plaintiffs' violation of the Court's Order than the ultimatum the Cargill Defendants propose. See Fed. R. Civ. P. 37(b)(2) (listing among other sanctions: striking pleadings, staying proceedings, and dismissal of the action).

The Supreme Court has taken a strong stand on Rule 37 sanctions, emphasizing that district courts may issue sanctions both to punish and to deter. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976); see also Adolph Coors Co. v. Am. Ins. Co., 164 F.R.D. 507, 519 (D. Colo. 1993). In choosing a sanction, the Court must consider the purposes to be served by the imposition of the sanction. White v. Gen. Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Zhou v. Pittsburg State Univ., 2003 U.S. Dist. LEXIS 1355, at \*13 (D. Kan. Jan. 13, 2003). A party's culpability militates in favor of harsher penalties, and in the Tenth Circuit, "any intentional failure as distinguished from involuntary noncompliance" constitutes a willful failure to comply with an order. M.E.N. Co. v. Control Fluidics, Inc., 834 F.2d 869, 872-73 (10th Cir. 1987). "No wrongful intent need be shown." Id.

There is no suggestion in this record that Plaintiffs' failure to adequately supplement their initial failed discovery responses was involuntary. Despite Plaintiffs' culpability, the Cargill Defendants are only requesting at this time that if Plaintiffs fail to abide by the



Court's Orders as to Cargill Interrogatories Interrogatory Nos. 3, 9, 13 and 16 and CTP Interrogatory Nos. 6, 13, and 15 within 10 days from the Court's Order, they be precluded from offering evidence in support of the specific allegations at which those interrogatories are directed. This proposed sanction is narrowly tailored to appropriately fit the wrong.

Plaintiffs' failure to abide by the various discovery Orders has unfairly prejudiced the Cargill Defendants in preparing their defenses to this action. The current Scheduling Order mandates that Plaintiffs produce their expert reports on injury, causation, and all other issues except damages by December 3, 2007. (Docket No. 1075 at 2.) The Defendants must then produce their responsive expert reports on all such issues by February 1, 2008. (*Id.*) As a result of Plaintiffs' refusal first to adequately answer and then to adequately supplement their interrogatory responses as directed by this Court, the Cargill Defendants are still unaware of the specifics of such key claims as those regarding the alleged creation of nuisances and alleged violations of federal and state regulations and laws. In sum, despite a strong discovery order in their favor, the Cargill Defendants remain handicapped and have lost months in the preparation of their case, including the critical February 1 expert disclosure, as a result of Plaintiffs' full discovery responses.

The proposed sanction will prevent further remedy some of the unfair prejudice experienced by the Cargill Defendants by forcing Plaintiffs to either choose to support their allegations or admit they have no support, or to forgo those allegations. In the 26th month of litigation, this is a reasonable and measured result for Plaintiffs' failure to follow this Court's Orders.

Respectfully submitted,

RHODES, HIERONYMUS, JONES,  
TUCKER & GABLE, PLLC

BY: s/ John H. Tucker (OBA #9110)

JOHN H. TUCKER, OBA #9110  
COLIN H. TUCKER, OBA #16325  
THERESA NOBLE HILL, OBA #19119  
100 W. Fifth Street, Suite 400 (74103-4287)  
P.O. Box 21100  
Tulsa, Oklahoma 74121-1100  
Telephone: 918/582-1173  
Facsimile: 918/592-3390

And

DELMAR R. EHRICH  
BRUCE JONES  
DARA D. MANN  
FAEGRE & BENSON LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
Telephone: 612/766-7000  
Facsimile: 612/766-1600

ATTORNEYS FOR CARGILL, INC. AND CARGILL  
TURKEY PRODUCTION LLC

### CERTIFICATE OF SERVICE

I certify that on the 28th day of August, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General  
Kelly Hunter Burch, Assistant Attorney General  
J. Trevor Hammons, Assistant Attorney General  
Robert D. Singletary  
Daniel Lennington, Assistant Attorney General

[drew\\_edmondson@oag.state.ok.us](mailto:drew_edmondson@oag.state.ok.us)  
[kelly\\_burch@oag.state.ok.us](mailto:kelly_burch@oag.state.ok.us)  
[trevor\\_hammons@oag.state.ok.us](mailto:trevor_hammons@oag.state.ok.us)  
[Robert\\_singletary@oag.state.ok.us](mailto:Robert_singletary@oag.state.ok.us)  
[Daniel.lennington@oag.ok.gov](mailto:Daniel.lennington@oag.ok.gov)

Douglas Allen Wilson  
Melvin David Riggs  
Richard T. Garren  
Sharon K. Weaver  
Riggs Abney Neal Turpen Orbison & Lewis

[doug\\_wilson@riggsabney.com](mailto:doug_wilson@riggsabney.com)  
[driggs@riggsabney.com](mailto:driggs@riggsabney.com)  
[rgarren@riggsabney.com](mailto:rgarren@riggsabney.com)  
[sweaver@riggsabney.com](mailto:sweaver@riggsabney.com)

Robert Allen Nance

[rnance@riggsabney.com](mailto:rnance@riggsabney.com)

Dorothy Sharon Gentry  
Riggs Abney

[sgentry@riggsabney.com](mailto:sgentry@riggsabney.com)

J. Randall Miller  
David P. Page  
Louis W. Bullock  
Miller Keffer & Bullock

[rmiller@mkblaw.net](mailto:rmiller@mkblaw.net)  
[dpage@mkblaw.net](mailto:dpage@mkblaw.net)  
[lbullock@mkblaw.net](mailto:lbullock@mkblaw.net)

William H. Narwold  
Elizabeth C. Ward  
Frederick C. Baker  
Lee M. Heath  
Elizabeth Claire Xidis  
Motley Rice

[bnarwold@motleyrice.com](mailto:bnarwold@motleyrice.com)  
[lward@motleyrice.com](mailto:lward@motleyrice.com)  
[fbaker@motleyrice.com](mailto:fbaker@motleyrice.com)  
[lheath@motleyrice.com](mailto:lheath@motleyrice.com)  
[cxidis@motleyrice.com](mailto:cxidis@motleyrice.com)

**COUNSEL FOR PLAINTIFFS**

Stephen L. Jantzen  
Paula M. Buchwald  
Ryan, Whaley & Coldiron, P.C.

[sjantzen@ryanwhaley.com](mailto:sjantzen@ryanwhaley.com)  
[pbuchwald@ryanwhaley.com](mailto:pbuchwald@ryanwhaley.com)

Mark D. Hopson  
Jay Thomas Jorgensen  
Timothy K. Webster  
Sidley Austin LLP

[mhopson@sidley.com](mailto:mhopson@sidley.com)  
[jjorgensen@sidley.com](mailto:jjorgensen@sidley.com)  
[twebster@sidley.com](mailto:twebster@sidley.com)

Robert W. George  
Michael R. Bond  
Erin W. Thompson  
LLP

[robert.george@kutackrock.com](mailto:robert.george@kutackrock.com)  
[michael.bond@kutackrock.com](mailto:michael.bond@kutackrock.com)  
[erin.thompson@kutackrock.com](mailto:erin.thompson@kutackrock.com) KutackRock

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.;  
AND COBB-VANTRESS, INC.**

R. Thomas Lay  
Kerr, Irvine, Rhodes & Ables

[rtl@kiralaw.com](mailto:rtl@kiralaw.com)

Jennifer S. Griffin  
Lathrop & Gage, L.C.

[jgriffin@lathropgage.com](mailto:jgriffin@lathropgage.com)

**COUNSEL FOR WILLOW BROOK FOODS, INC.**

Robert P. Redemann  
Lawrence W. Zeringue  
David C. Senger  
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

[rredemann@pmrlaw.net](mailto:rredemann@pmrlaw.net)  
[lzeringue@pmrlaw.net](mailto:lzeringue@pmrlaw.net)  
[dsenger@pmrlaw.net](mailto:dsenger@pmrlaw.net)

Robert E. Sanders  
E. Stephen Williams  
Young Williams P.A.

[rsanders@youngwilliams.com](mailto:rsanders@youngwilliams.com)  
[steve.williams@youngwilliams.com](mailto:steve.williams@youngwilliams.com)

**COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.**

George W. Owens  
Randall E. Rose

[gwo@owenslawfirmmpc.com](mailto:gwo@owenslawfirmmpc.com)  
[rer@owenslawfirmmpc.com](mailto:rer@owenslawfirmmpc.com)

The Owens Law Firm, P.C.

James M. Graves  
Gary V. Weeks  
Bassett Law Firm

[jgraves@bassettlawfirm.com](mailto:jgraves@bassettlawfirm.com)

**COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.**

John R. Elrod  
Vicki Bronson  
Bruce W. Freeman  
Conner & Winters, LLLP

[jelrod@cwlaw.com](mailto:jelrod@cwlaw.com)  
[vbronson@cwlaw.com](mailto:vbronson@cwlaw.com)  
[bfreeman@cwlaw.com](mailto:bfreeman@cwlaw.com)

**COUNSEL FOR SIMMONS FOODS, INC.**

A. Scott McDaniel  
Nicole M. Longwell  
Philip D. Hixon  
McDaniel, Hixon, Longwell & Acord, PLLC

[smcdaniel@mhla-law.com](mailto:smcdaniel@mhla-law.com)  
[nlongwell@mhla-law.com](mailto:nlongwell@mhla-law.com)  
[phixon@mhla-law.com](mailto:phixon@mhla-law.com)

Sherry P. Bartley  
Mitchell Williams Selig Gates & Woodyard  
**COUNSEL FOR PETERSON FARMS, INC.**

[sbartley@mws gw.com](mailto:sbartley@mws gw.com)

Michael D. Graves  
Dale Kenyon Williams, Jr.

[mgraves@hallestill.com](mailto:mgraves@hallestill.com)  
[kwilliams@hallestill.com](mailto:kwilliams@hallestill.com)

**COUNSEL FOR CERTAIN POULTRY GROWERS**

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert  
Secretary of the Environment  
State of Oklahoma  
3800 North Classen  
Oklahoma City, OK 73118  
**COUNSEL FOR PLAINTIFFS**

Charles L. Moulton  
Arkansas Natural Resources Commission  
323 Center Street  
Suite 200  
Little Rock, AR 72206

s/ John H. Tucker